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IN THE

SUPREME COURT OF THE UNITED STATES

No. 75-259

R. L. GARDNER and RUTH GARDNER - - Petitioners

versus

THE NASHVILLE HOUSING AUTHORITY OF THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE;
JACK D. HERRINGTON, Secretary and Executive Director;
VANDERBILT UNIVERSITY; and
UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT - - Respondents

---

CHARLES H. ADAIR and JUNE P. ADAIR - - Petitioners

versus

THE NASHVILLE HOUSING AUTHORITY OF THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE;
JACK D. HERRINGTON, Secretary and Executive Director;
VANDERBILT UNIVERSITY; and
UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT - - Respondents

---

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioners herein pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above entitled consolidated cases (its case numbers 74-1687 and 74-1688) on April 10, 1975. A motion for rehearing was denied by order dated June 18, 1975.

OPINIONS BELOW

The opinion of the Circuit Court of Appeals for the Sixth Circuit is unreported and is printed in the Appendix hereto, *infra*, pages 85-89. The opinion of the United States District Court for the Middle District of Tennessee is printed in the Appendix hereto, *infra*, pages 66-83. The order of the United States District Court for the Middle District of Tennessee pursuant to that opinion is printed in the Appendix hereto, *infra*, page 84.

A prior opinion and order in the same consolidated cases of the Circuit Court of Appeals for the Sixth Circuit is unreported and is printed in the Appendix hereto, *infra*, pages 63-65. The opinion of the United States District Court for the Middle District of Tennessee from which the first appeal was taken is unreported and is printed in the Appendix hereto, *infra*, pages 25-62. The order entered by the District Court pursuant to that opinion is printed in the Appendix hereto, *infra*, page 62. The order Denying Petition for Rehearing is printed in the Appendix hereto, *infra*, pages 90-91.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered April 10, 1975. The order overruling a motion for rehearing was entered June 18, 1975. The jurisdiction of the court is invoked under 28 USC, Sec. 1254(1).

QUESTIONS PRESENTED

I. Whether it is necessary to prove by *overt* actions that a conflict of interest exists before the actions of an Administrative Board are void if the facts are that in an Urban Renewal project two members of the Nashville Housing Authority are officers and stockholders of certain banks, those banks own property within the project area and the officers' superiors, who also own stock in the banks, are members of the Board of Trust of Vanderbilt University which is profiting from the project and must contract with the Nashville Housing Authority; and the engineers who declare that the project area was an eligible project were employees of both the Nashville Housing Authority and the Vanderbilt University?

II. Whether the action of a housing authority is valid in declaring an area to be slum and blighted even though the members of the commission are not aware of the findings and admittedly did not understand the standards used to declare a project area slum and blighted and every house contained a workable plumbing, heating and electrical system?

III. What is, constitutionally, a "fair and meaningful hearing" under the due process clause of the Constitution before an Administrative Agency and what type of "fair and meaningful hearing" is required by 42 USCA, Sec. 1453(d)?

IV. Whether 42 USCA, Sec. 1463, is unconstitutional as violative of the due process clause of the Fourteenth Amendment *in its application to this project and these petitioners,* where the property is taken primarily for the private use and benefit of Vanderbilt University and only incidentally for a public use?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Amendment V:

> "No person shall . . . be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation."

UNITED STATES CODE

42 USCA Sec. 1455(d):

> "(d) No land for any project to be assisted under this subchapter shall be acquired by the local public agency except after public hearing following notice of the date, time, place, and purpose of such hearing."

42 USCA Sec. 1463(a):

> "(a) In any case where an educational institution or a hospital is located in or near an urban renewal

project area and the governing body of the locality determines that, in addition to the elimination of slums and blight from such area, the undertaking of an urban renewal project in such area will further promote the public welfare and the proper development of the community (1) by making land in such area available for disposition, for uses in accordance with the urban renewal plan, to such educational institution or hospital for redevelopment in accordance with the use or uses specified in the urban renewal plan, (2) by providing, through the redevelopment of the area in accordance with the urban renewal plan, a cohesive neighborhood environment compatible with the functions and needs of such educational institution or hospital, or (3) by any combination of the foregoing, the Secretary is authorized to extend financial assistance under this subchapter for an urban renewal project in such area without regard to the requirements in section 1460 of this title with respect to the predominantly residential character or predominantly residential re-use of urban renewal areas. The aggregate expenditures made by any such institution or hospital (directly or through a private redevelopment corporation or municipal or other public corporation) for the acquisition within, adjacent to, or in the immediate vicinity of the project area, of land, buildings, and structures to be redeveloped or rehabilitated by such institution for educational uses or by such hospital for hospital uses in accordance with the urban renewal plan (or with a development plan proposed by such institution, hospital, or corporation, found acceptable by the Secretary after considering the standards specified in section 1460 (b) of this title, and

approved under state or local law after public hearing) and for the demolition of such buildings and structures if, pursuant to such urban renewal or development plan, the land is to be cleared and redeveloped, and for the relocation of occupants from buildings and structures to be demolished or rehabilitated, as certified by such institution or hospital to the local public agency and approved by the Secretary, shall be a local grant-in-aid in connection with such urban renewal project; *Provided,* That no such expenditure shall be eligible as a local grant-in-aid in any case where the property involved is acquired by such educational institution or hospital from a local public agency which, in connection with its acquisition or disposition of such property, has received, or contracted to receive, a capital grant pursuant to this subchapter: *Provided further,* That no such expenditure shall be deemed ineligible as a local grant-in-aid in connection with an urban renewal project, to the extent that the expenditure is otherwise eligible, if the facilities, land, buildings, or structures with respect to which the expenditure is made are located within one mile of the project."

Tennessee Code Annotated, Sec. 13-813:

"13-813. Blighted areas defined.—Blighted areas are areas (including slum areas) with buildings or improvements which, by reason of dilapidation, obsolescence, overcrowding, faulty arrangement or design, lack of ventilation, light and sanitary facilities, excessive land coverage, deleterious land use, or obsolete layout, or any combination of these or other factors, are detrimental to the safety, health, morals, or welfare of the community."

Tennessee Code Annotated, Sec. 13-910:

> "13-910. *Interest of commissioners or employees in contracts—Misconduct.*—No commissioner or employee of an authority shall acquire any interest direct or indirect in any housing project or in any property included or planned to be included in any project, nor shall he have any interest direct or indirect in any contract or proposed contract for materials or services to be furnished or used in connection with any housing to be furnished or used in connection with any housing projects. If any commissioner or employee of an authority owns or controls an interest direct or indirect in any property included or planned to be included in any housing project, he shall immediately disclose the same in writing to the authority and such disclosure shall be entered upon the minutes of the authority. Failure to so disclose such interest shall constitute misconduct in office."

STATEMENT

Each of the petitioners was a long time resident and property owner in the Vanderbilt Urban Renewal area of Nashville, Tennessee (which, according to doctors of philosophy, psychology and sociology who testified was the best and most viable residential area in Nashville), sought to enjoin threatened condemnation of their homes in the United States District Court at Nashville.

The area involved for condemnation was exactly the area needed by Vanderbilt University for expansion, as determined by the engineering firm of Clarke

and Rapauno as engineers for Vanderbilt University who also, as engineers for the Nashville Housing Authority, conducted the surveys showing the area was slum and blighted.

The Urban Renewal Project was for the direct financial benefit of Vanderbilt University which agreed to pay the purchase price for all the land within the area to be condemned. The Nashville Housing Authority members that judged the area to be slum and blighted were not even conversant with the standards used by HUD and the firm of Clarke and Rapauno at the time of the trial and at the time of the finding that the area was slum and blighted. The members were not even conversant with the project plan and stated they relied solely on the recommendation of the engineering firm that was employed at the same time by both Vanderbilt University and Nashville Housing Authority.

Two members of the Nashville Housing Authority were officers of two banks, the chief executive officer of each of which was a member of the Vanderbilt Board of Trust and each of the Housing Authority members and their superiors owned stock in the employing banks. Both banks stood to gain through bond issues and deposits from the project and owned property in the area.

The director of Urban Renewal for Nashville Housing Authority was a Vanderbilt graduate; the HUD representative that approved the project was a Vanderbilt graduate; and the Assistant Urban Renewal Direc-

tor who coordinated the work was a Vanderbilt graduate. The Chancellor of Vanderbilt University was a director of the Federal Reserve Branch at Atlanta that exercised control over the two banks involved. The engineering firm of Clarke and Rapauno, which had been employed by both Vanderbilt and NHA, stood to gain financially if the project was approved.

At the required public hearing, a different definition of substandard was given to the public than was used by the engineers of HUD. The plan was filed only a few days before the public hearing and the administrator of HUD testified that the finding of Nashville Housing Authority was based on survey sheets, which the Nashville Housing Authority refused to give to the land owners until after approval of the project. These survey sheets showed that both banks owned property in the Urban Renewal area and, upon trial in the District Court, the evidence was so abundant in establishing the inaccuracy and the obsolescense of the surveys as to destroy their integrity.

The public hearing consisted of each protestant being allowed to speak for five minutes and no opportunity of cross-examination of the proponents or the presentation of evidence. Upon trial in District Court, the HUD official agreed that no intelligent protest could be made without access to the survey sheets, which had been denied to the property owners, and that with the short period of time involved, even with the survey sheets, protestants did not have sufficient time to adequately prepare for the hearing. The only legal

adviser at the public hearing was the attorney for Vanderbilt University.

Petitioners sought to enjoin threatened condemnation.

REASON FOR GRANTING WRIT

The questions above present serious problems and extremely important questions in the field of eminent domain concerning which this Court has either not made a definitive ruling or in which there is an apparent conflict between decisions of the Circuit Courts of Appeal.

It has been more than twenty years since this Court's decision in *Berman* v. *Parker,* 348 U. S. 26, 99 L. Ed. 27 (1954), which was rendered only a relatively short time after the urban renewal concept came into implementation. This Court has for the most part been silent on many questions which have arisen in the federal courts under the urban renewal laws.

Berman answered certain basic urban renewal eminent domain questions but the questions which that case did not call upon the Court to decide and the questions which have arisen from the decision itself in the are of property rights require consideration by this Court and elaboration of the meaning of this constitutional guarantee as it is affected by the urban renewal laws.

This case presents some of these questions.

One example of the problems which property owners have in urban renewal cases is that this record

shows a HUD official testified that under present regulations there was no way for a property owner to make any effective protest of the taking of his property.

In short, it is imperative that this Court declare, first, whether there is to be in reality *any* limitation upon the powers of local urban renewal agencies and upon HUD and, secondly, if this power is not to be absolute, what the limitations are.

ARGUMENTS SUPPORTING REASONS FOR GRANTING WRIT

Question I

Under the Administrative Procedures Act, the Tennessee Code Annotated and the common law, public officials are prohibited from interest in projects or matters within their jurisdiction, and this Court needs to clarify the law relative to conflict of interests by public officials. The different Federal Courts of Appeal and State Courts have various decisions and the term needs to be succinctly and adequately defined by this Court. This question has not been decided in this Court previously.

State statutes like the Tennessee Statute (TCA 13-910), which prohibits any commissioner from having any interest, either direct or indirect, in any project or in any property included in the project, are declaratory of the common law. 10 McQuillen, Municipal Corporations, Sec. 29.99, p. 483.

The federal courts held, even prior to adoption of the Administrative Procedures Act (which contains a

provision to guard against bias and partiality, or even the suspicion of it, in the part of administrative officers with decision making powers), that administrative officials were subject to a rule closely akin to that applicable to Judges when the question of possible bias or conflict of interest by administrative officers arose. In *Berkshire Employees Assn.* v. *NLRB,* 3rd Cir. 1941, 121 F. 2d 235, the court stated at page 238:

> ". . . One of these essentials is the resolution of contested questions by an impartial and disinterested tribunal. These adjectives are not absolute but relative as every thoughtful person knows. Decisions affecting human beings, made by human beings, necessarily are colored by the sum total of the thoughts and emotions of those responsible for the decision . . ."

The court rejected the argument that the evidence showed only one member of the NLRB was not in a position to judge the case impartially, stating:

> ". . . We deem this answer insufficient. Litigants are entitled to an impartial tribunal whether it consists of one man or twenty and there is no way which we know of whereby the influence of one upon the others can be quantitatively measured."

Following adoption of the Administrative Procedure Act, the federal courts continued to rely not only the act but upon the inherent right of a person affected by such decision to have a fair hearing by one having no interest and no potential interest, direct or indirect,

in the result of the decision. This has been referred to as "Procedural Due Process" to a degree that any such interest or potential interest would void the proceedings. See, for example, *Amos Treat and Co.* v. *SEC.* CADC, 1962, 306 F. 2d 260 at page 265, where the court said:

> ". . . It is not enough that here no corruption has been charged, indeed appellants expressly disclaim personal bias and prejudice. What must control is the policy this court has previously applied and the principles, discernible from the cases and from the statute, that the investigative as well as the prosecuting arm of the agency must be kept separate from the decisional function."

The court accordingly concluded "Solely on due process grounds" that the appellants' claim should be heard.

Yet the Court of Appeals in the case at bar held in effect that overt acts of conflict of interest must be proved before actions of an administratvie agency would be set aside by the courts. This position clearly rejects the universally recognized principle that it is not necessary that the advantage be a personal financial one or that there be a showing that the particular official sought or gained such an advantage. It also effectively repeals the statutory and common law prohibition against any indirect interest.

Wilson v. *Iowa City* (Iowa 1965), 165 N. W. 2d 1813, a state court urban renewal case involving a university, enunciates the applicable conflict of interest

principles but was distinguished by the Court of Appeals when it was not distinguishable. The opinion attempts to make a distinction when there is no difference and terms as dicta in the Iowa opinion that which is not dicta. Other states adhere to the Iowa rule (cf. *Josephson* v. *Planning Board of Stanford* (Conn. 1964), 199 A. 2d 690, 10 ACR 3d 687, and *Griggs* v. *Borough of Princeton* (New Jersey), 162 A. 2d 862).

It is the potential for conflict which the law prohibits. Since the potential was manifest here the Court of Appeals of necessity rejected the principle, particularly in the light of the affected commissioners' total ignorance of standards to be applied in urban renewal projects.

Question II

The Court of Appeals dismissed the petitioner's contention that the action of the Nashville Housing Authority, HUD and Metropolitan Council declaring the project area to be slum and blighted was arbitrary, capricious and in bad faith without discusssion, merely stating that it found "no arbitrary and capricious actions on the part of either the federal or the local agencies."

This decision makes it necessary for this Court to provide guidelines for the lower federal courts; for the record of the trial of this case in the District Court shows conclusively that if the standards set by HUD has been applied in this case honestly, accurately and objectively, the area would not have qualified; and the evidence further shows that the Commissioners of the

Nashville Housing Authority and the director did not even know what those standards were.

The evidence at the trial showed that both the Nashville Housing Authority and the Metropolitan Council, being ignorant of the standards to be applied and also being ignorant of the actual condition of the neighborhood, merely relied upon the report of the engineering firm of Clarke and Rapauno, the dual employee of both the Housing Authority and the beneficiary of the project, Vanderbilt University. The question which this record presents to this Court is whether public officials whose duty it is to determine whether or not an area is slum and blighted and whether citizens' property is to be taken from them may make a decision without having any informed judgment as to the merit of the particular project, or whether in so acting their decision is arbitrary, capricious and in bad faith. The further question then arises whether, being arbitrary, capricious and in bad faith, the courts will strike down such action.

This Court many years ago held that the courts may look into the facts justifying particular legislation to determine whether they did in fact exist and whether there was therefore a rational basis for its enactment. In *U. S.* v. *Carlene Products Co.*, 304 U. S. 144, 82 L. Ed. 1234, the court stated at page 152:

> "We may assume for present purposes . . . that a statute would deny due process which precluded the disproof in judicial proceedings of all facts which would show or tend to show that a statute depriving the suitor of life, liberty or property had a rational basis."

The Court further stated as 153:

> "Similarly we recognize that the constitutionality of a statute, valid on its face, may be assailed by proof of facts tending to show that the statute as applied to a particular article is without support in reason because the article, although within the prohibited class, is so different from others of the class as to be without the reason for the prohibition . . ."

Put another way, legislative fiat may not take the place of fact in the judicial determination of issues involving life, liberty or property. *Western & A. Ky. Co.* v. *Henderson,* 279 U. S. 639 (1929).

In *Dobbins* v. *Los Angeles,* 195 U. S. 223, 49 L. Ed. 169, the Supreme Court set forth the following principles governing attack upon the validity of municipal legislation and stated at page 236:

> ". . . it is now thoroughly well settled by decisions of this court that Municipal by-laws and ordinances, and even legislative enactments undertaking to regulate useful business enterprises, are subject to investigation in the courts with a view to determining whether the law or ordinances is a lawful exercise of the police power, *or whether, under the guise of enforcing police regulations, there has been an unwarranted and arbitrary interference with the constitutional rights to carry on a lawful business, to make contracts, or to use and enjoy property* . . ." (Emphasis supplied.)

If the court will thus look behind the legislative enactment (as the ordinance of the Metropolitan Coun-

cil approving the project was) *a fortiori* it will examine such actions by administrative agency.

The right to judicial review by one aggrieved by agency action under cases of this type has been sustained in a number of federal cases. *Norwalk Core* v. *Norwalk Redevelop. Agency,* 395 F. 2d 920; *Merge* v. *Sharott,* 3rd Cir. 1965, 341 F. 2d 989; *Gart* v. *Cole,* 2nd Cir. 1958, 263 F. 2d 244, cert. denied, 359 U. S. 978, L. ed. 2d 929; *Powelton Civic Home Association* v. *HUD,* E. D. Penn. 1968, 284 F. Supp. 209. And the Sixth Circuit recognized the right of judicial review of state agency action under the Federal Highway Act in *Nashville I-40 Steering Committee* v. *Ellington,* 6th Cir. (1967), 387 F. 2d 179. See also *Hardin* v. *Kentucky Utilities,* 1968, 390 U. S. 1, 19 L. Ed. 2d 787, and *Abbott Laboratories* v. *Gardner,* 387 U. S. 367 (1967).

Yet in this case the effect of the result in the District Court and the decision of the Court of Appeals is to ignore these rules.

If the action of officials who are ignorant of facts and likewise ignorant of rules and standards to apply to the facts are not reviewable, then there is no meaning to any rule of law providing that the courts will review arbitrary and capricious acts of government officials.

Applying the rule in Urban Renewal cases, it seems obvious that if a particular area does not qualify under the established criteria but is nevertheless approved, both the administrative and legislative determination (in the face of the true facts) are, to say the least, arbitrary and capricious.

Question III

The question of what is a fair and meaningful hearing before an administrative agency is one which has frequently arisen in the lower courts, but this Court has not directly passed on the question presented by this case and it is necessary that guidelines be defined by this Court as to what standards are to be applied in order to have a fair and meaningful hearing before administrative boards. This Court, in *Chicago, Burlington and Quincy Railroad* v. *City of Chicago,* 166 U. S. 276, 236, laid down the general rule that "in determining what is due process of law regard must be had to substance, not to form," but it is the applicability of that rule which is troublesome, the trial court finding in this case that an adequate hearing was accorded these property owners and the Court of Appeals not even discussing the question.

The contention of the petitioners that they were denied their right to a meaningful and substantive public hearing in connection with the question of whether the area qualified as slum and blighted and whether, therefore, their property was to be taken was dismissed by the Court of Appeals with the statement that it found "no procedural due process."

The effect of the decision of the Court of Appeals in this case likewise appears to conflict with the position the same court took in considering what was an adequate hearing before an administrative agency in *Nashville I-40 Steering Committee* v. *Ellington* (6th

Cir. 1967), 387 F. 2d 179. Moreover, the effect of the Court's decision in holding the hearing process adequate in this case seems to flatly contradict the principles laid down by the Fourth Circuit in *Appalachian Power Co. v. Environmental Protection Agency* (1974), 477 F. 2d 495, where that Court stated at page 503:

> "What is required in all instances, *whatever the character of the administrative action,* is 'the reality of an opportunity to submit an effective presentation,' and, if in the context of the issue involved, 'cross-examination on the crucial issues' is found proper, such right should be recognized and upheld." (Emphasis supplied.)

In this case petitioners were denied not only the opportunity to present evidence and cross-examine at the so-called hearing (being limited to a few minutes to express personal views) but also access to the necessary facts, data and statistical reports vital to make a defense. A hearing was held in form only, not substance. Nothing in the hearing process in this case approached the most minimum requirements.

In his work entitled ADMINISTRATIVE LAW, Peter Wall states at page 72:

> ". . . As presently defined, in order for due process to be operative in administrative proceedings, private parties must have opportunity for recourse to the formal hearing stage within the agency, for only at that state are procedures sufficiently formalized and opportunity present for further appeal to the judicial branch . . ."

The author went on to state at page 24:

> "In *Southern Ry. Co.* v. *Va.* the Court stated emphatically that a state statute authorizing an administrative officer to require railroads to substitute overhead crossings for existing grade crossings whenever it seemed necessary for the public safety and convenience violated the Fourteenth Amendment because of its failure to provide for notice and hearing. The Court noted that 'before its property can be taken under the edict of an administrative officer the appellant is entitled to a fair hearing upon the fundamental facts.' "

The author's analysis of the *Southern Railway Company* case pictures a situation comparable to the dilemma of these plaintiffs; in its application there is little or no difference between a situation in which a statute authorizes an administrative body to take property without a hearing, and a situation in which the administrative body ignores the substantive effect of a statute requiring a hearing, the result being the same. In either instance the parties are denied their property without an opportunity to develop "the fundamental facts." Here the record conclusively shows that neither the NHA Commissioners nor the members of the Metro Council had any of the knowledge of the "fundamental facts" necessary to make an intelligent and rational decision as to whether the University Center is qualified as a slum and blighted area. Both bodies, it is clear from the record, relied upon the investigation of a private firm, whose interest it was to see that the area qualified, without attempting to

discover the specific facts revealed by the investigation and without giving property owners an opportunity to question or dispute the investigation. On the contrary, the facts developed at the trial conclusively show that these plaintiffs and other property owners were in fact prevented from questioning the investigation and the resulting project area report which was approved by NHA and the Council. It was not until after this lawsuit was filed that they were able to obtain the so-called "facts" supposedly established by the investigation. It was then of course too late to make any defense, or even an informed presentation, at the hearing.

Question IV

It was held in *Berman* v. *Parker,* 1954, 348 U. S. 26, 75 S. Ct. 98, 99 L. Ed. 27, that the fact that private interests will benefit from the taking of an individual's property in Urban Renewal projects will not necessarily render that taking unconstitutional. But it was not held that such a taking is constitutional when the object and purpose, rather than the effect, is to give the property to private interests, in the first instance. If the purpose and object of the project is a public one, as it was in *Berman,* that is one thing; if the object there had been to take the landowner's commercial establishment for the purpose of giving it to private interests to erect a new commercial establishment, that would have been altogether different.

In this case it is undenied that Vanderbilt intended, prior to the conception of this project, to acquire as

much of this property as possible for expansion, this plan forming some time in the late 50's; that Vanderbilt either approached the Housing Authority, or vice versa, with a proposal that federal money be obtained to achieve Vanderbilt's ends; that when sufficient funds were not available, the 1960 nine hundred acre project was cut to Vanderbilt's specifications; that the concept, object and the purpose of the project became for Vanderbilt; and that they were not to be merely an incidental beneficiary of the project, as the statute contemplates, but the originator and cause thereof.

That it had already been decided to acquire this property for the University project before the inspection surveys had been made or any information as to the condition of the area had been obtained, is clearly shown by the record in this case. The problem then was not to determine whether the area qualified but to try to justify acquisition of the area for Vanderbilt, a purely private purpose with incidental public benefits.

While possibly broadening the "public use" concept to include "public benefit," it is submitted that *Berman* v. *Parker* did not go so far as to hold that the taking of private property for an urban renewal project would be constitutional if the project's primary purpose were for private benefit, so long as it has incidental public benefits. Yet that is the situation here.

The following rule, therefore, is still applicable to this case even in the light of *Berman* v. *Parker*.

> "To constitute a public use, the public must be, to some extent, entitled to use or enjoy the prop-

erty as a matter of right . . . The use and benefit, hence, although it may be restricted to the inhabitants of a small area, should be common, and not limited to particular individuals or estates . . . On the other hand, the use is not public *where the benefit to the municipality is merely incidental and purely prospective* . . . and the fact that an enterprise serves or employs large numbers of people does not make its purpose a public use to authorize condemnation of property therefor . . ." McQuillen, Municipal Corporations, 3rd ed., Sec. 32.39a, p. 375. (Emphasis supplied.)

CONCLUSION

For the reasons set forth above, it is respectfully submitted that their petition for a writ of certiorari be granted.

Respectfully submitted,

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